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No. 99-269

In The

Supreme Court of the United States

STATE OF NEW YORK, et al.,

Petitioner,

v.

SENECA NATION OF INDIANS, and
UNITED STATES OF AMERICA,

Respondents.

STATE OF NEW YORK,

Petitioner,

v.

SENECA NATION OF INDIANS, TONAWANDA
BAND OF SENECA INDIANS, and
UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under *Arizona v. California*, 460 U.S. 605 (1983), the claims of the Seneca Nation of Indians and the Tonawanda Band of Senecas may proceed against the State of New York, notwithstanding its Eleventh Amendment immunity, where the United States has intervened and filed identical claims.

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STATEMENT OF THE CASE

The Seneca Nation and the Tonawanda Band of Seneca Indians concur with the Statement of the Case as set forth by the Petitioner. As indicated in the Statement of the Case, the Seneca parties and the United States moved to dismiss the State's appeal in this case for lack of appellate jurisdiction because the requirements of the collateral order doctrine set forth in *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144-45 (1993), were not met. A motions panel of the court denied the motions to dismiss, and the Seneca respondents did not seek interim review of this jurisdictional issue. The Seneca respondents bring this issue to the Court's attention now for the sole purpose of meeting their obligation to point out a possible jurisdictional defect in the case.

REASONS TO DENY THE WRIT

I. The Court's Decision in *Arizona v. California* is Controlling

The decision in *Arizona v. California*, 460 U.S. 605 (1983), is dispositive of the issue raised in this case. In its 1983 decision, which has not been overruled or modified, the Court held that the federal judicial power was not enlarged by allowing Indian tribes to intervene in an action in which the United States was a party and had filed claims on its own behalf and on behalf of the tribes. The Court stated:

> Nothing in the Eleventh Amendment "has ever been seriously supposed to prevent a State's being sued by the United States." *United States v.*

> *Mississippi*, 380 U.S. 128, 140 (1965). *See, e.g., United States v. Texas*, 143 U.S. 621, 646 (1892); *United States v. California*, 297 U.S. 175 (1936); *United States v. California*, 332 U.S. 19, 26-28 (1947). The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 745, n.21 (1981).

460 U.S. at 614. The Court concluded that the tribes met, at minimum, the requirements for permissive intervention because they would be bound by any judgment issued in the case, and because:

> the Indians are entitled "to take their place as independent qualified members of the modern body politic." [Citation omitted.] Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

460 U.S. at 615.

The courts below correctly relied on *Arizona v. California* in refusing to dismiss the Seneca plaintiffs' claims in these cases. The State of New York concedes here that it does not have Eleventh Amendment immunity as against the United States. It also concedes that the claims of the Seneca Nation and the Tonawanda Band are identical to the claims filed by the United States. Neither does the State dispute the Senecas' certain right under Rule 24 to intervene in the United States' action, were the

Senecas' claims to be dismissed. Under these circumstances, *Arizona v. California* is controlling.[1] *See also Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904, 913 (8th Cir. 1997), *aff'd on other grounds*, 119 S. Ct. 1187 (1999).

The district courts below, as affirmed by the Second Circuit, correctly held that even if the Senecas' claims are barred by the State's Eleventh Amendment immunity, the Senecas would still be entitled to intervene in the United States' case. The State's argument that it is immune from the claims of the Senecas, notwithstanding that the identical claims will be litigated by the United States, would abrogate Rule 24 of the Federal Rules of Civil Procedure in cases involving state defendants. The State's position

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[1] Contrary to the State's arguments, *Arizona v. California* is not distinguishable from the Seneca cases as one where the tribal claims under consideration were asserted initially by the United States. The case was an original action filed in 1952 to determine relative rights to the waters of the Colorado River. *Arizona v. California*, 373 U.S. 546 (1963), *decree entered*, 376 U.S. 340 (1964), *supplemental decree entered*, 439 U.S. 419 (1979). In 1977, prior to the entry of the supplemental decree, five Indian tribes moved to intervene in the proceedings in order to oppose entry of the 1979 decree so that they could make additional claims to water of approximately 500,000 acre-feet. 460 U.S. at 611-12. The United States joined in the additional claims some two years later. *Id.* This Court allowed the tribes to intervene permissively under Rule 24 of the Federal Rules of Civil Procedure. *Id.* at 614-15. As quoted above, the Court relied on the well-established principal that the Eleventh Amendment does not bar suits by the United States against states, and held that the judicial power of the court would not be enlarged by granting the tribes intervention where the tribes did not seek to bring new claims or issues.

directly conflicts with *Arizona v. California* and its petition for certiorari accordingly should be denied.[2]

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[2] In a final effort to avoid the obvious import of *Arizona v. California*, the State argues that the *Arizona* decision is limited to original jurisdiction suits because of the Court's reliance in *Arizona* on *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). State's Petition at 19-20. This is not true for two reasons. First, the Court explicitly addressed the Eleventh Amendment issue in *Arizona v. California* and did not limit its discussion to original jurisdiction suits. Second, *Maryland v. Louisiana* represents an expansion of intervention principles to allow third parties to intervene in original jurisdiction actions, not a limitation of intervention to such original actions. *See Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) (holding that a private party's request for leave to intervene in an original jurisdiction action between states is to be denied absent a showing of a compelling individual interest not represented by a state) (citing *New Jersey v. New York*, 345 U.S. 369, 373 (1953); comparing Fed. R. Civ. P. 24(a)(2)).

Moreover, the State's quotation of language from the first part of footnote 21 of *Maryland v. Louisiana* is misleading. State's Petition at 20. The quoted language, which responds to Louisiana's argument that the Eleventh Amendment restricts original jurisdiction suits as between states, has no relevance to the intervention issue in this case. However, the second part of footnote 21, which addresses intervention by various entities in the suit, is directly relevant to and clearly supports the Court's holding on intervention in *Arizona*. The Court stated:

> Given that the Tax is directly imposed on the owner of imported gas and that the pipelines most often own the gas, those companies have a direct stake in this controversy and in the interest of a full exposition of the issues, we accept the Special Master's recommendation that the pipeline companies be permitted to intervene, noting that it is not unusual to permit intervention of private parties in original actions. See Oklahoma v. Texas, 258 U.S. 574 (1922). Cf. Trbovich v. Mine Workers, 404 U.S. 528 (1972).

II. There is No Conflict between *Arizona v. California* and Later Eleventh Amendment Decisions or Other Decisions of this Court

This Court's decision in *Arizona v. California* recognizes and rests on the basic proposition that states are not immune from suits brought by the federal government. 460 U.S. at 614 *citing United States v. Mississippi*, 380 U.S. 128, 140 (1965); *United States v. Texas*, 143 U.S. 621 (1892); *United States v. California*, 297 U.S. 175 (1936); *United States v. California*, 332 U.S. 19, 26-28 (1947). *See Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n.14 (1996). Once jurisdiction is established as to the United States' claims against the state, the Court held, third parties may intervene so long as no new claims or issues are raised. 460 U.S. at 614.

Subsequent Eleventh Amendment decisions of the Court have not retreated from the established principles on which *Arizona* rests. In particular, in cases involving Indian tribes and their vital property interests and jurisdiction, tribes have regularly appeared as parties along with the United States in suits involving state defendants, including two cases from this Court's last term. *See, e.g., Minnesota v. Mille Lac Band of Chippewa Indians*, 119 S. Ct. 1187 (1999); *Montana v. Crow Tribe*, 118 S. Ct. 1650 (1998); *In re the General Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988), *aff'd, Wyoming v. United States*, 492 U.S. 406 (1989); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *Nevada v. United States*, 463 U.S. 110 (1983); *Montana v. United States*,

450 U.S. 544 (1981). In both *Mille Lacs* and *Crow Tribe*, decided last term, the United States intervened in the suits filed by the tribes against the States of Minnesota and Montana respectively. *Mille Lacs*, 119 S. Ct. at 1195; *Crow Tribe*, 118 S. Ct. 1655-56.[3] Neither the Court nor anyone else suggested that the tribal plaintiffs were not proper parties, notwithstanding that both cases involved state defendants.

The decisions New York cites as modifying or overruling *Arizona v. California* are clearly distinguishable. In *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 250-53 (1985), defendant counties filed cross-claims for indemnity against the State of New York. The tribal plaintiffs had not asserted any claims against New York, and the United States was not a party to the case at all. Because the judicial power of the court would have been enlarged by allowing the separate third-party indemnity claims to proceed under these circumstances, the Court found that the Eleventh Amendment precluded the exercise of ancillary jurisdiction over pendent, non-tribal claims. Similarly, in *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), the Court dismissed pendent state law claims brought by third parties where the United States had not brought such claims and lacked standing to do so. 465 U.S. at 103 n.12. The Court held that the presence of the United States did not eliminate the immunity of the state for purposes of the separate state-law claims to which the United States was not a

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[3] In the *Crow Tribe* case, the United States intervened in the suit filed by the Crow Tribe against the State of Montana five years after the case was filed. *Id.*

party.[4] These cases, involving ancillary and pendent claims not brought by the United States, clearly have no application here where, as the State has conceded, the United States and Seneca claims are identical, and the United States' claims will be litigated whether or not the Senecas are parties.

New York also baldly asserts that the United States is something less than a full party to this litigation and that because the requisite exercise of "political responsibility" for the suits is lacking, this case conflicts with the Court's decision in *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States."). However, the logical conclusion of New York's argument is not that the Senecas cannot participate in the United States' claims, but that the United States cannot maintain its suit. This hardly squares with the State's concession that the United States' claims are not barred by the Eleventh Amendment.

The State's assertion that the Senecas are controlling the litigation decisions of the United States and its Department of Justice in the present cases is wholly

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[4] Specifically, the Court held in *Pennhurst* that "the United States' presence in the case for any purpose does not eliminate the States' immunity for all purposes." *Id.* However, even in *Pennhurst*, the United States' presence eliminated the States' immunity for purposes of the claims brought by the United States. Thus *Arizona* and *Pennhurst* are entirely consistent in this regard.

unsupported. The State's objections amount to nothing more than complaints about the United States' decision to intervene in the present cases. New York has conveniently forgotten that the United States has a trust responsibility to Indian tribes to protect their property interests. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). Participation by the Senecas in the United States' claims in these cases no more "denigrates the dignity and respect" of the states, State's Petition at 17, than does the filing of the United States' claims. New York's complaints about the United States' litigation decisions do not provide a legal basis to invalidate intervention principles merely because the defendant is a state.

Nor is this a case where the United States has delegated its exemption from Eleventh Amendment immunity to the Senecas. *See* State's Petition at 17, *citing United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999), *supplemental opinion*, 173 F.3d 890 (D.C. Cir. 1999) (Eleventh Amendment did not bar qui tam relator from maintaining False Claims Act claim against the state), *petition for cert. filed*, 68 U.S.L.W. 3116 (Aug. 2, 1999) (No. 99-213).[5] The United States is a full party in these cases, and the Second Circuit has made

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[5] *See also United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (June 24, 1999) (No. 98-1828). *But see United States ex rel. Foulds v. Texas Tech. Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars False Claims Act qui tam suit against a state in federal court), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 23, 1999) (No. 99-321), *petition for cert. filed*, 68 U.S.L.W. 3153 (Aug. 27, 1999) (No. 99-365); *United States v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (same).

clear that the State retains its Eleventh Amendment immunity to the extent the Senecas attempt to raise new claims or issues. *Seneca Nation of Indians v. State of New York, et al.*, 178 F.3d 95, 97 (2d Cir. 1999) (citing *Arizona v. California*, 460 U.S. at 614) (State's Appendix 1a, 5a). The State's immunity is thereby fully protected.

In filing its petition, New York seeks nothing less than the nullification of Rule 24 in cases brought against it by the United States. No decision of this Court or any lower court supports or even suggests such an extreme result. There is no tension between the decision below and any decision of this Court or any other court.

III. The Significance of the Issue in these Cases, If Any, Has Been Eliminated by the Court's Recent Eleventh Amendment Immunity Decisions

New York would have the Court believe that there is a serious ongoing practice in which the United States "employs a tactic" of intervening at the last minute to "resuscitate Indian actions against the States." State's Petition at 22. If left unchecked, according to New York, this practice will severely "curtail the States' Eleventh Amendment immunity." *Id.* This plea ignores the practical effect of recent Supreme Court decisions in cases involving claims against states.[6]

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[6] To the extent the State's plea suggests a timeliness problem, this is resolved by reference to Fed. R. Civ. P. 24. The courts below correctly determined that the United States' claims were timely and the United States was otherwise entitled to intervene in the cases. Moreover, the United States' alleged motivation (to resuscitate the claims, according to the State) is not a relevant factor under Rule 24. In short, the timing of the

In recent years, the Court has decided cases that dramatically curtail tribes' ability to sue states directly without the participation of the United States. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991). These cases ensure that the issue of state sovereign immunity will be addressed by the courts at the earliest stages of any litigation in which a tribe or other party asserts claims against state defendants. Failure of the United States to appear as co-plaintiff or promptly assert its claims would risk the dismissal of the claims on the state defendants' first motions to dismiss. As a practical matter, there are likely to be few if any cases filed by Indian tribes against states without the United States' participation at the outset.

Finally, the cases here were filed in 1985 and 1993, before the Court's defining Eleventh Amendment decisions above.[7] The same is true for every pending Indian land claim case in New York, *see Cayuga Indian Nation of New York v. Pataki*, 80-CV-930, 80-CV-960 (N.D.N.Y.) (filed in 1980); *Oneida Indian Nation of New York v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (filed in 1974); *St. Regis Mohawk Tribe v. State of New York*, 82-CV-783, 82-CV-1114, 89-CV-829 (N.D.N.Y.) (filed in 1982 and 1989); *Stockbridge-Munsee Community v. State of New York*, 86-CV-1140 (N.D.N.Y.) (filed in 1986), as well as *Mille Lacs Band of*

United States' intervention does not implicate New York State's Eleventh Amendment immunity.

[7] The second Seneca case was filed after *Blatchford*, but before *Seminole* and *Coeur d'Alene*.

Chippewa Indians v. Minnesota, 124 F.3d 904, 910 (8th Cir. 1997) (filed in 1990). *See* State's Petition at 22. The significance of the issue raised here by defendant State – tribal plaintiffs' ability to assert their previously filed claims against states after United States' intervention – has been eliminated by *Blatchford*, *Seminole* and *Coeur d'Alene*.

CONCLUSION

For the forgoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: October 15, 1999.

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